Clear Lam Packaging, Incorporated *and* Communication Workers of America AFL–CIO (CWA), Petitioner. Case 13–RC–15746

December 8, 1982

DECISION AND DIRECTION

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered an objection and determinative challenges in an election[1] held on July 23, 1981, and the Hearing Officer's report and errata recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs,[2]and hereby adopts the Hearing Officer's findings, as modified,[3] and his recommendations.

We agree with the Hearing Officer's conclusion that, based on the evidence in its totality, four of the five challenged voters were statutory supervisors and hence the challenges to their ballots were sustained properly. *Inter alia*, we predicate our conclusion on the Hearing Officer's findings that Thomas Carberry, David Burks, Thomas Cozza, and David Young demonstrated responsible direction and independent judgment in the exercise of their work tasks, particularly when confronted with "rush jobs" or material or machine disfunction. On the other hand, *inter alia*, because Jack Carney's direction and work assignments were analogous to those relayed by skilled workers to apprentices and helpers, and because Carney was on a lower rung in the Employer's "chain of command" than the other alleged night supervisors (Burks and Young), we conclude, in agreement with the Hearing Officer, that Carney was not a supervisor and that his ballot should be opened and counted.

DIRECTION

It is hereby directed that the Regional Director for Region 13 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Decision, open and count Jack Carney's ballot and thereafter prepare and serve on the parties a revised tally of ballots, including the count of said ballot, and thereafter issue the appropriate certification based on that revised tally.

MEMBER HUNTER, concurring in part and dissenting in part:

Although I agree with my colleagues' conclusion that the Board agent properly voided the marked ballot, and therefore that Petitioner's objection should be overruled, I disagree with their affirmance of the Hearing Officer's resolution of the *Norris-Thermador* issue in the case.

Unlike my colleagues, I find merit in the Employer's argument that it is improper and injudicious at this stage of the proceeding to determine whether the five challenged voters are supervisors given that the parties here have bound themselves to the list of eligible voters by agreeing to the *Norris-Thermador* list. In *Norris-Thermador Corporation*, 119 NLRB 1301, 1301–02 (1953), the Board stated that when "the parties enter into a *written and sined agreement* which *expressly* provides that issues of eligibility resolved therein shall be final and binding upon the parties, the Board will consider such an agreement, and only such an agree-

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 20 votes for, and 19 votes against, Petitioner. There were five challenged ballots.

[2] In adopting the Hearing Officer's finding that the parties' *Norris-Thermador* list (see *Norris-Thermador Corporation*, 119 NLRB 1301 (1958)) was not dispositive of the challenged voters' eligibility to vote, Chairman Van de Water relies on *Rosehill Cemetary Association*, 262 NLRB 1289 (1982). Additionally, although no copy of the contested *Norris-Thermador* list was included in the record, inasmuch as, from all indications, the stipulation appeared to have gone only to the ultimate legal question of eligibility to vote, Member Jenkins concludes that the preelection agreement was not binding on the parties. See *Judd Valve Co., Inc.*, 248 NLRB 112 (1980) (Member Jenkins, concurring). Both Chairman Van de Water and Member Jenkins agree that, in view of the circumstances of the case, this case falls within the specific exception to the *Norris-Thermador* rule and they find, contrary to their dissenting colleague, that it would contravene the Act and established Board policy to accord finality to the parties' stipulation because the challenged voters' ballots were challenged on the ground of their statutory supervisory status.

[3] In adopting the Hearing Officer's findings, we correct certain statements in the Hearing Officer's report. First, the Hearing Officer stated inadvertently that Thomas Carberry had 2 to 3 years of experience as a pressman. We correct his error by noting that Carberry had 23 years of experience as of the time he was hired by the Employer in 1980. Second, we note that the Hearing Officer indicated erroneously that David Young's and David Burks' job responsibilities, but not Jack Carney's, included approval of the proof sheets off the plate mounter before their transmittal to the printing press. According to uncontroverted record testimony, Carney did, in fact, proof the sheets in the same manner as Burks and Young. Although this factor was an indicator of the challenged voters' supervisory status, the remaining evidence outweighed this factor in demonstrating that Carney's status was that of an employee, not a supervisor. Third, we place no reliance on the Hearing Officer's report to the extent that it may be read to indicate that an incident involving the unauthorized shutdown of machinery by employees in the laminating department exemplified Young's disciplinary authority. Fourth, we qualify the Hearing Officer's findings that Carberry, Burks, Young, and Thomas Cozza assigned and reassigned employees to particular jobs or machines by noting that their power to assign and reassign work was limited by Urry's oral instructions and the daily written production orders. Notwithstanding this, however, we note that the frequent occurrence of "rush jobs" or machine or material disfunction necessitated their exercise of discretion in reordering job assignments by deviating from these instructions. Fifth, we find merit In Petitioner's contention that the Hearing Officer's description of the percentage range between Carney's hourly rate and that of the press operators was erroneous. We therefore place no reliance on the Hearing Officer's wage rate differential analysis in determining that Carney is not a supervisor.

ment, a final determination of the eligibility issues treated therein unless it is, in part or in whole, contrary to the Act or established Board policy."

To permit the parties to disregard a stipulation disposing of unit placement or eligibility issues at this stage of the proceeding, as my colleagues would, strikes at the very heart of the consent election system and seems to sanction the parties' ability to manipulate the system to fit their particular needs. A stipulation is a stipulation; the parties knowingly entered into this agreement of their own accord and should be given credit for having determined whether the voters fell within the statutory supervisory standard when they determined which employees were eligible to vote. I would not now let either party disavow the agreement because their determination of the eligibility to vote issues was thwarted by unfavorable election results.

With respect to the distinction drawn by Member Jenkins between a factual stipulation and a stipulation addressing only the ultimate legal question of eligibility to vote, I see no reason for construing parties' agreements naming certain individuals as eligible to vote as any different in effect or intent from a stipulation listing the duties and authorities of the named individuals. An agreement that certain individuals are eligible to vote inherently includes the agreement that they do not exercise supervisory functions and do not fall within the statutory definition of supervisor. Accordingly, both forms of agreement concern the same ultimate fact—the lack of supervisory indicia. Therefore, I would accord full and binding legal effect to the *Norris-Thermador* list in the present case and would not review the five challenged voters' status for the purpose of deciding their eligibility,[4] but rather would direct that the Regional Director issue a revised tally of ballots and an appropriate certification based thereon. See generally the dissenting opinion in *Laymon Candy Company*, 199 NLRB 547, 548 (1972).

[4] Consistent with the view expressed here, I concur in the recommendation to open and count the ballot cast by Jack Carney.